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CITATIONS

285-459—68——1

JURISDICTION

The judgment of the three-judge district court was entered on August 22, 1967.[3] The notice of appeal was filed on October 23, 1967.[4] The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b). *Chicago and N.W. Ry. Co.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 326, and *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349.

QUESTION PRESENTED

A petition filed with the Interstate Commerce Commission under Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) sought modification of Commission-prescribed divisions for apportioning the revenues received from the interterritorial transportation of North-South freight under joint rates. After considering data and upon making findings relating to each of the Section 15(6) criteria, the Commission found the existing divisions inequitable and prescribed new divisions in proportion to the relative costs of the two groups of carriers in handling the interterritorial traffic at issue. The cost figures used by the Commission were basically derived from Rail

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[3] Although the district court's judgment is dated August 8, 1967, only Circuit Judge Wisdom signed it on that date—the other judges (West and Hunter) separately signing it on later and different dates at different places prior to its entry on August 22, 1967; this is reflected by the clerk's filing stamp (see B. & O. J. S. App. 33a).

[4] Since the sixtieth day after entry of judgment was October 21, 1967, a Saturday, filing of the notice of appeal in the district court on the following Monday, October 23, 1967, was timely. See Rule 6(a), F.R.Civ.P.; *Union National Bank* v. *Lamb*, 337 U.S. 38, 40–41. Also Saturday is a legal holiday in New Orleans (La. Rev. Stat. Ch. 2, § 55.

Form A,[5] which produces average unit costs for territorial freight service, although the Commission made certain adjustments to Rail Form A costs to reflect more accurately the costs of the particular traffic involved. The district court, in rejecting adjusted Rail Form A costs as a proper yardstick for this purpose, held that the Commission was required to base its computations on more refined cost data. The question presented is whether, in ascertaining the relative costs of service in an interterritorial divisions case, the Commission may rely on Rail Form A data as to territorial average costs, adjusted to reflect more accurately the costs of the particular traffic involved, or is required to develop more refined cost data.

[5] Rail Form A, first developed in 1939, is the basic formula almost universally recognized and used by the transportation industry and the Commission as an acceptable and reliable method of ascertaining and comparing relative costs of rail service in all types of rate proceedings involving a large and varied body of traffic. See *New York* v. *United States*, 331 U.S. 284, 315–318. Generally, the expenses of carriers assigned to geographical areas are first broken down into groups and are translated into territorial average unit costs of performing each of the kinds of services involved in moving specific shipments or in furnishing a given amount of service in each territory. The territorial figures achieved reflect the average unit costs for carload freight service under a wide range of operating conditions within each territory. Adjustments are contemplated to fit any peculiar characteristics of particular shipments for individual as well as groups of railroads. When the average unit costs are multiplied by the number of work units of each of the services found to be employed in moving the specific shipment or furnishing the given amount of service in the territory, the cost figures thus produced will be the substantial equivalent of specific costs of the particular traffic in question. Costs are placed into two classes—(1) out-of-pocket or variable expenses which vary directly with the kind

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STATUTES INVOLVED

Section 1(4) of the Interstate Commerce Act (49 U.S.C. 1(4)), and Sections 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. (Supp. II, 1965–1966) 557(c) and 706) are set forth in Appendix D to the Jurisdictional Statement filed by the Baltimore & Ohio R. Co., *et al.* in the companion appeal.

Primarily involved is Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)), which provides:

> Whenever * * * the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential * * * the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers * * *. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of

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of traffic handled; and (2) constant or fixed costs not capable of assignment to particular kinds of traffic which normally must be borne by various types of traffic in proportion to the ability of each to pay. The sum of the out-of-pocket costs plus a *pro rata* distribution of the constant or fixed costs is referred to as "fully distributed costs".

such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

STATEMENT

1. INTRODUCTION

This appeal concerns the imposition by a district court of certain novel standards for the Interstate Commerce Commission to follow in exercising its Section 15(6) authority to prescribe just, reasonable and equitable divisions of joint rates. The case arises out of the Commission's 1965 order prescribing new divisions of the revenues derived from interterritorial freight traffic moving under joint rates between points in the Northern and Southern[6] sections of the eastern part of the country. The rates subjected to the Commission's order cover all commodities, with a few exceptions, and produce approximately $496 million in revenues annually. The shift in revenues which would result from the new divisions is approximately $8 million a year, which amounts to an overall reduction of approximately three percent of the revenues of the Southern lines from the traffic involved (325 I.C.C. at 50, 453–454).

[6] As here used, the North embraces Official Territory, which lies generally east of Lake Michigan, Chicago, Peoria, and Cairo, Illinois, and St. Louis, Missouri, and north of the Ohio River and Norfolk, Virginia; the South embraces Southern Territory, which lies south of Official Territory and east of the Mississippi River.

2 PROCEEDINGS BEFORE THE COMMISSION

In 1953, in *Official-Southern Divisions*, 287 I.C.C. 497, the Commission prescribed divisions, on the basis of equal-mileage factors, for apportioning the North-South freight revenues. That determination was based on a finding that, in computing costs of service under Rail Form A standards, "the safest assumption for the future * * * [is] that neither contesting group will have an appreciably lower basis of operating costs than the other * * *" (287 I.C.C. at 526).

In 1956, the Northern roads petitioned for a general reopening and rehearing, and for modification of the divisions previously prescribed, on the ground, among others, that the Northern lines' costs had proved to be substantially higher than those of the Southern roads. Upon completion of the reopened proceeding in 1965, the Commission found that the existing divisions were in violation of Section 15(6) in that they allocated to the Southern lines a greater share of the revenues from the joint rates than that to which they were entitled (325 I.C.C. at 50). Considering each of the Section 15(6) criteria, the Commission found all of the relevant factors, except for costs, to be substantially equal,[7] but concluded that

[7] It was found that both groups are being operated efficiently and neither group should be considered as more or less efficient than the other (325 I.C.C. at 18); that there are no differences in importance to the public attributable to the services of the two groups (325 I.C.C. at 28), and that neither group has greater revenue needs than the other (325 I.C.C. at 49).

computations under restated Rail Form A cost standards established a decisive difference in the relative costs of rendering the service involved.

More specifically, the Commission pointed out (325 I.C.C. at 18–19, 24) that both groups of carriers had tried and submitted their cases on the basis of fully distriuted costs computed under Rail Form A, although the Southern lines had presented twelve adjustments to Rail Form A costs which, they asserted, would improve the accuracy of the figures so derived. The Northern lines introduced other detailed data, in considerable bulk, establishing the validity of the Rail Form A costs as a proper standard of measurement and the impropriety of the Southern lines' proposed adjustments. Disputes over the applicability of Rail Form A costs and the various adjustments occupied a large part of the administrative record. However, the only essential differences between the parties related to the degree to which Rail Form A territorial average costs should be modified to fit the specific traffic, and to the meaning and significance of the Southern lines' suggested adjustments. In a comprehensive analysis rejecting seven of the Southern lines' adjustments as unsound or based on unsupported and inapplicable facts or assumptions, the Commission concluded that the restated Rail Form A costs which it used, based on the Southern lines' cost and traffic studies except as to the rejected adjustments, "more reliably", "accurately", and "adequately reflect the

costs which are attributable to the traffic at issue" (325 I.C.C. at 25–26, 48).[8]

Noting that in the sample year selected by the Southern lines "the northern lines received 44.64 percent of the revenue while incurring 46.35318 percent of the fully distributed costs," the Commission determined that "[i]t is clear that an adjustment in the divisions is required to compensate the respective groups according to their expenditures in the joint effort of handling this interterritorial traffic" (325 I.C.C. at 50).[9] "To the extent that the present divisions do not meet this test," the Commission stated, "they are unjust, unreasonable, and inequitable" (*ibid.*). Accordingly, the Commission prescribed new divisions in the form of divisional mileage scales (*id.* at 82) which "are based on the fully distributed costs and divide the

[8] Consideration of such cost data lead the Commission to conclude that its "restatement of the costs, which are reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis, shows that the cost level in 1956, the year both groups used in the final cost analysis, is somewhat higher in the North than in the South for like services. A consideration of all factors indicates that this situation will most likely continue in the immediate future" (325 I.C.C. at 48).

[9] In rejecting the contentions of the Southern Governors' Conference that uniform divisions based on equal-mileage factors should be continued, the Commission pointed out that "an adherence to uniformity as such, without a careful evaluation of the statutory criteria and the evidence of record, can hardly result in the fixing of just, reasonable, and equitable shares" (325 I.C.C. at 27). Application of the revised divisions would result, the Commission stated, in a 3.59-percent increase in the revenues of the Northern roads, and a corresponding 2.908-percent decrease in the revenues of the Southern lines (325 I.C.C. at 50).

revenue in the same proportion to those costs" (*id.* at 50), finding that "the results achieved through the application of the * * * scales here prescribed will for the future be just, reasonable, and equitable * * *" (*id.* at 51).[10]

3. PROCEEDINGS IN THE DISTRICT COURT

In March 1965, the Southern roads brought suit before a three-judge district court to enjoin enforcement of and to set aside the Commission's order establishing the new divisions. The court held that the Commission's restated Rail Form A costs, based on territorial costs of all freight service, were not a proper yardstick for measuring the costs of the particular traffic in a divisions case. In the court's view, the Commission was required "to take affirmative action to require the development of an adequate record as to the actual costs of handling the specific traffic at issue" (B. & O. J.S. App. 30a). The district court, accordingly, set aside the Commission's order as not supported by substantial evidence and reasoned findings within the meaning of Sections 8(b) and 10(e) of the Administrative Procedure Act, and remanded the case for further proceedings consistent with its opinion.[11]

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[10] See also 325 I.C.C. at 453–454, where, in its supplemental report, the Commission reaffirmed its conclusions, that revised divisions were required and that the cost data used provided an adequate evidentiary basis for the newly-prescribed divisional scales.

[11] However, the court granted a stay of judgment pending appeal (B. & O. J.S. App. 35a). Accordingly, the new divisions are in effect subject to conditions requiring a financial settle-

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THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal raises important issues concerning the administration of Section 15(6) of the Interstate Commerce Act, under which the Commission is charged with assuring that revenues from joint rates are fairly and equitably divided among the participating carriers. Despite language to the contrary in its opinion, the district court in effect held that the Commission may not compute the relative costs of handling particular traffic in an interterritorial divisions case on the basis of Rail Form A territorial average costs. In so holding the district court rejected a procedure previously approved by this Court and one which the carriers here had followed before the Commission—that of presenting data and providing analysis on the basis of Rail Form A computations, adjusted in certain respects to reflect more accurately the relative costs of handling the specific traffic at issue. In disapproving this established procedure, and in imposing on the Commission the burden of conducting special cost studies, the district court has significantly impaired the Commission's ability to resolve this or any subsequent divisions case of similar magnitude and to administer Section 15(6) effectively. Plenary consideration by this Court is thus warranted.

1. The distict court erred in holding that, in a divisions case involving virtually all traffic between two widespread territories, the Commission is required to develop more refined data reflecting the exact costs of

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ment among the carriers back to the date the Commission's order was permitted by the court to go into effect (April 20, 1965), if the judgment is affirmed on appeal.

the particular service and cannot accept, as a standard of measurement, computations produced through use of Rail Form A territorial average costs as appropriately adjusted.[12]

Years ago this Court sustained the integrity of the Rail Form A formula (*New York* v. *United States,* 331 U.S. 284), and has consistently approved the application of restated Rail Form A costs as a proper standard for measuring costs of service in divisions cases involving a large and varied body of interterritorial traffic handled by over 300 railroads (*Chicago & N.W. Ry. Co.* v. *Atchison, T. & S.F. Ry. Co.,* 387 U.S. 326), as well as a single commodity handled by two railroads intraterritorially (*Carolina & N.W. Ry. Co.* v. *United States,* 234 F. Supp. 114, affirmed, 380 U.S. 526). In addition, the Rail Form A formula is only one of a number of similar approaches developed by the Commission for determination of the costs of service of the various kinds of common carriers subject to its regulation. Rejection by the district court of Rail Form A cost figures necessarily raises doubt as to the validity of other similar formulas as well.

Whether a cost study is adequate or should have been refined or supplemented by additional data has long been recognized as a question of fact which is

[12] While the Commission's order was in terms ultimately set aside for lack of substantial evidence and adequate findings, the district court reached that conclusion only after rejecting the Commission's specific findings as to the adequacy of restated Rail Form A costs because these findings did not comply with the court's view of the proper standard of cost measurement to be applied (see, *e.g.*, B. & O. J.S. App. 11a, 25a, 29a).

within the special competence and discretion of the Commission. *E.g., Illinois Commerce Comm'n* v. *United States,* 292 U.S. 474, 481, 484. Here the parties requested that the fully distributed costs of service be utilized, and the Commission merely adhered to the recognized practice of restating Rail Form A territorial average costs to produce a reasonable reflection of the expenses incurred in handling the particular North-South traffic in question.[18]

Indeed, the use of Rail Form A cost figures, in ascertaining relative fully distributed costs in a large interterritorial divisions case such as this, is compelled as a practical matter. Rail Form A data is readily available, and does not include the biases which special cost studies conducted by the contesting parties might understandably reflect. Allocation of an appropriate part of some overhead or constant cost items to the particular traffic is plainly proper, and,

[18] The costing procedures or methods used here in adjusting the Southern lines' studies (325 I.C.C. at 24–25) are the same as those which the Commission employed with the unanimous approval of this Court just last Term in *Chicago & N.W. Ry. Co.* v. *Atchison, T., & S.F. Ry. Co.*, 387 U.S. at 351, 354, except that the costs here were computed on a fully distributed basis. In the *Chicago & N.W. Ry. Co.* case the Commission found significant the smallness of the percentage-point difference between two cost showings—one based on a study made in great detail of the particular service rendered, and the other involving a straight Rail Form A application. It concluded that "one substantiates the other, and supports the view that, for a large and varied body of traffic as here at issue, territorial average costs will be the substantial equivalent of specific costs". (321 I.C.C. at 49–50). In this case, a similar comparison of two such studies establishes that the percentage-point difference is almost infinitesimal (see 325 I.C.C. at 25–26).

if appropriate, Rail Form A cost figures can be restated or adjusted so as to exclude those constant cost items which should not be taken into acount. As to each item the question is essentially one of practical and informed judgment. In its report the Commission here pointed out that "[t]erritorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of traffic moving to and coming from terminals in all parts of both territories" (325 I.C.C. at 96). Yet, the district court substituted its own view for that of the body charged by Congress with the duty of effectuating the public interest in the existence of "divisions that colloquially may be said to be fair" (*Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 357–360).

The district court was quite correct in stating that here the Commission prescribed new divisions on the basis of the relative costs of service in handling the interterritoral traffic involved, and that the Commission concluded that neither group of carriers had shown its revenue needs to be greater than those of the other. But that hardly leads to the conclusion that the restated Rail Form A costs data used by the Commission was inadequate. Here the Commission compared the relative costs of the respective groups in providing the service at issue by using fully distributed costs adjusted in certain respects to reflect the costs of the particular traffic more accurately. What the Southern roads complained about—and persuaded the district court to accept—was that, in their view, the Commission had not made additional adjustments to the cost data which they had suggested. In that

respect, both the Southern lines and the district court seriously misconceive the Commission's function under Section 15(6).

Congress, in enacting Section 15(6), never intended for the Commission, whether in cases grounded on a comparison of costs of service or a consideration of other factors as well, simply to perform essentially ministerial tasks in calculating how joint freight rates should be divided. Rather, the Commission's duty is to effectuate "the public interest in maintaining all essential parts of the transportation system" (325 I.C.C. at 49). Here, in rejecting the Northern lines' argument "that their revenue needs are greater since the Southern lines' average rates of return are somewhat higher," the Commission specifically pointed out that its "prescription of divisions based on relative costs includes allowance for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved" (*ibid.*).[14] Thus, in determin-

[14] Indeed, this Court has approved the Commission's use in divisions cases of cost evidence which reflects a due or fair proportion of the overall burden of doing business. *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 360, 378 (see 325 I.C.C. at 49). That the language of Section 15(6)—"property held for and used in the service of transportation"—is broad enough to support consideration of all railroad property—and thus fully distributed costs—was recognized in the *Baltimore & Ohio R.R. Co.* case, where the Court stated (298 U.S. at 360): "It requires no discussion to demonstrate that § 15(6) authorizes the Commission to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property. And unquestionably the paragraph also em-

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ing the adequacy of the cost data and the propriety of using fully distributed costs, as appropriately adjusted, the Commission was acting in consonance with the statutory duty imposed upon it by Congress. The significance of that congressional authorization, and the wide latitude of discretion which necessarily accompanies it, was disregarded by the district court in substituting its judgment for that of the Commission with regard to the sufficiency of the cost evidence on which its determination was based.

Nor is the district court's suggested distinction (B. & O. J.S. App. 25a–26a) of this Court's decision of last Term in *Chicago & N.W. Ry. Co.* v. *Atchison, T. & S.F. R. Co.*, 387 U.S. 326, apposite (see note 13, *supra*). There, although the lower court had not dealt directly with the cost issues, this Court found the "attacks on the legal invalidity of the Commission's findings on costs * * * so insubstantial that no useful purpose would be served by further proceedings * * *" (*id.* at 356). In the instant case, like in *Chicago & N.W. Ry. Co.*, "[t]he presentation and discussion of evidence on cost issues constituted a dominant part of the lengthy administrative hearings, and the issues were fully explored before the Commission," and "[i]ts factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry" (*ibid.*). Here, like there, "the Commission's

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powers the Commission to take into account the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration."

disposition of these matters is sufficient to show that its conclusions had reasoned foundation and were within the area of its expert judgment" (*ibid.*). It follows, then, that the district court failed to accord sufficient weight to the Commission's resolution of such matters in the instant case. Indeed, under that court's holding, little if anything is left to informed expertise and practical judgment of the administrative body in this regard. Such a result was not intended by Congress when it conferred sweeping authority on the Commission, in Section 15(6), to ensure the fairness of divisions in the public interest.[15]

It was never contemplated by Congress that costs of service in divisons cases be ascertained with exact and irrefutable mathematical precision.[16] Indeed, it is rather illusory to assume that the exact costs allocable to particular traffic can be definitively ascertained. In point of fact, any particular shipment's actual cost is necessarily an apportionment of the various expenses incurred in providing and maintaining facilities and in

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[15] Nor can enactment of the Administrative Procedure Act be viewed as having restricted the scope of the Commission's authority under Section 15(6), or as having overruled or qualified this Court's past decisions upholding that authority (see *Chicago & N.W. Ry. Co.* v. *Atchison, T., & S.F. Ry. Co.*, 387 U.S. at 342).

[16] Mathematical precision is, of course, technically impossible since empirical judgments are essential to the distribution of overhead. *New York* v. *United States*, 331 U.S. 284 at 324, 328; *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349 at 378. When conclusions are based on cost, the entire cost must be taken into account, *i.e.*, "the outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned." *Northern Pacific R.R. Co.* v. *North Dakota*, 236 U.S. 585, 597.

conducting rail operations generally. Here the contesting groups of carriers recognized the necessity of using the Rail Form A territorial average formula for measuring costs of service; the only difference between the parties involved the degree to which such costs should be modified to fit the specific traffic at issue. In view of its conclusion that, as restated with some adjustments, the Rail Form A cost data submitted was of such quality, credibility and accuracy so as to persuade it that such data adequately and reliably reflected the costs of handling the North-South traffic at issue, there was no need for the Commission to have embarked upon an independent investigation to determine whether the parties might be overlooking or concealing some relevant evidence. See *Chicago & N.W. Ry. Co.* v. *Atchison, T., & S.F. Ry. Co.*, 387 U.S. at 343. Under the circumstances, it can hardly be said that the Commission violated any statutory duty or abused its discretion in failing to have undertaken the development of more refined cost data.[17] Cf. *Brotherhood of Maintenance of Way Em-*

[17] Indeed, it is clear that only limited use could be made of the more refined cost data required by the district court. First, the Commission could decide that Rail Form A computations are not adequate to measure the costs of handling North-South traffic because the characteristics of the services performed in handling that traffic are so different from average traffic as to require special treatment (see *Boston & M. R.R. Co.* v. *United States*, 208 F. Supp. 661, 674-5 (D.C. Mass., 1962), affirmed 371 U.S. 26). But this possibility was provided for by Commission procedure and the contrary was shown. A second possible use would be to demonstrate that the Rail Form A territorial data with respect to individual services was so extreme as to distort the costs of handling North-South traffic. Here again, how-

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ployees v. *United States*, 221 F. Supp. 19, 28 (E.D. Mich.), affirmed, 375 U.S. 216; *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993, 1013–1014 (M.D. Fla.), affirmed, 386 U.S. 8. And, despite the Southern lines' assertion that the Northern roads had failed to carry their burden of showing that the existing divisions were unjust and should be revised (see B. & O. J.S. App. 12a), what the Commission actually concluded—as the district court acknowledged—was that "the Northern lines established a prima facie case that Rail Form A costs properly measure the cost of the specific traffic" (*id.* at 19a), and that the Southern roads had not overcome this *prima facie* case insofar as their suggested but rejected adjustments were concerned.

In sum, the district court's holding that the restated Rail Form A cost figures were improperly utilized by the Commission is erroneous and conflicts with established practice under decisions of this Court. It is of great importance to the administration of the Commission's Section 15(6) duty to effectively super-

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ever, the Commission allowed for such a showing. Thus, the Southern lines contended, for example, that empty-return ratio on auto parts cars should be adjusted. The Commission considered, but rejected, such allegations (325 I.C.C. at 69). Accordingly, the only new purpose to be served by refined cost data would be to challenge the propriety of the Rail Form A cost formula—either to require more accuracy or to restrict consideration to only those costs directly pertaining to the traffic in question. Moreover, this effort to achieve a theoretically perfect formula for ascertaining relative costs of particular traffic without allowances for overhead and return conflicts with the broad purposes underlying Section 15(6)—even in a case such as this where relative costs of service was the criterion on which the adjustment was grounded.

vise the fairness of divisions on interterritorial traffic that the judgment below be reversed.[18]

2. Although the district court placed major emphasis on the Commission's use of Rail Form A figures, it cited three cost items—solely related costs of suburban passenger service, switching costs, and empty-return ratios of box cars—as "important separate issues" of "greater significance as illustrations of the more pervasive error" in using Rail Form A as a standard for measuring the relative costs of particular traffic in a divisions case. We submit the court erred again in rejecting the Commission's computations with respect to these cost items on the ground that they were unsupported by reasoned findings and substantial evidence within the meaning of Sections 8(b) and 10(e) of the Administrative Procedure Act.[19]

The Commission adequately took into account in this case the questions whether expenses solely related to suburban passenger service should be excluded from the fully distributed costs and whether Rail Form A switching costs and empty-return ratios should

[18] In a concluding paragraph of its opinion, the district court stated that the cost data used by the Commission, in addition to the other infirmities which it had found, "[w]ith the passage of each year * * * becomes more and more vulnerable to the charge of staleness," so that a reopening of the proceeding by the Commission to obtain more current data "well might be warranted" (B. & O. J.S. App. 32a). Considering the time-consuming nature of complex, interterritorial divisions cases such as this one, however, the court's suggestion in this regard might result in the Commission's never being able to decide such cases on the basis of sufficiently recent data—thus negating its authority under Section 15(6).

[19] 5 U.S.C. 557(c)(A) and 706(2)(E).

be refined to reflect more accurately the costs of the North-South traffic involved. With respect to the latter items, the Commission made comprehensive findings rejecting the Southern lines' proposed adjustments because they were based on unsupported theoretical computations and factual assumptions and contained a variety of weaknesses, both in the sample used and in the studies themselves (325 I.C.C. at 64–68, 69–70, 71–77).[20] Here the Commission had before it an abundance of evidence, typical in character and ample in quantity, which established that the services performed in handling the interterritorial traffic shared the same facilities in common with other traffic and that the North-South traffic involved is average traffic, influenced by and in turn influencing other traffic.

With respect to suburban passenger deficits, the Commission first referred to the Southern lines' single example of solely related costs and found that "although many individual items of suburban service can be considered solely related, the facilities and service as a whole cannot be considered solely related

[20] For example, as to switching cost studies, the Southern lines made reference to only 41 out of 967,554 cars. As to empty-return ratios, the Commission applied empty-return ratios from a seven-day study developed from supervised data all railroads are required to furnish by Commission order, which produced ratios of 39 percent in the North and 33 percent in the South. This data included auto parts' cars. The Southern Lines proposed to assign an assumed 100-percent empty-return ratio for auto parts' cars and an assumed 30-percent ratio for all other box car traffic. The Commission found the assumptions on which the proposed adjustments were based erroneous and unsupported (325 I.C.C. at 68).

* * * and treated entirely apart from freight service and intercity passenger service" (325 I.C.C. at 78). The Commission then went on to conclude that (*ibid.*):

> Because the suburban service deficit includes common costs which must be incurred to provide freight service and intercity service, such costs are properly chargable to those services to the extent they cannot be recovered from suburban operations, and the deficit from suburban operations should not be excluded from the constant costs.[21]

Indeed, the Commission's approach in this regard is consistent with the established practice, specifically approved by this Court, of fixing freight rates on the basis of including passenger deficits as part of freight service costs. See *King* v. *United States*, 344 U.S. 254, 261, 267; *Chicago, M., St. P & P. R.R. Co.* v. *Illinois*, 355 U.S. 300, 307; *Public Service Comm'n of Utah* v. *United States*, 356 U.S. 421, 426. And here, the passenger deficits were unquestionably included in fixing

[21] In point of fact, the Southern lines supported inclusion of passenger deficits in the cost figures to be used in assaying the propriety of the existing divisions. However, they sought to have the Commission draw a distinction between intercity and suburban passenger deficits, since it was desirable, from their point of view, to have the intercity passenger deficits of the Southern roads included. The Commission found it unjustifiable, as a practical matter, to make such a distinction. The district court, however, overturned the Commission on this question, since it viewed intercity deficits as sufficiently related to the common facilities which must be maintained to provide freight service (B. & O. J.S. App. 20a), but, ignoring the Commission's express findings to the contrary, chose to regard suburban deficits quite differently.

the level of, and in granting general increases in, the joint freight rates on North-South traffic. See *Increased Freight Rates, 1948,* 276 I.C.C. 9, 32–39; *Increased Freight Rates E. W. & S. Territories, 1956,* 300 I.C.C. 633, 641–647, 657–658; *Railroad Passenger Train Deficit,* 306 I.C.C. 417, 477–479; and S. Rep. No. 445, 87th Cong., 1st Sess., p. 285.

Thus, after making the basic determination that passenger deficits should be included in the fully distributed costs, the Commission apportioned a share of the entire Northern and Southern lines' passenger deficits to the costs of the North-South service involved, in the same proportion that that particular traffic bears to the total traffic in each territory.[22] The district court rejected the method employed by the Commission, stating flatly that the Administrative Procedure Act requires findings on "the critical

[22] The formula employed by the Commission provides equal recognition and treatment of passenger deficits on each side of the border since it includes intercity and suburban deficits in the North and the South as well as local passenger service deficits in the South. Thus, contrary to the district court's view (B. & O. J.S. App. 20a–21a), this is not a case where the Commission has given controlling weight to passenger deficits and has required carriers in one part of the country to subsidize passenger operations elsewhere. Upon Southern lines insistence the Commission included passenger deficits within fully distributed costs. But as to anything beyond that it specifically found (325 I.C.C. at 49) that nothing "presented here offers a concrete basis on which to find that either group is entitled to a share of the joint rates larger than accruing under the divisions hereinafter prescribed on the basis of relative costs [which] includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved."

issue * * * [of] how much of the railroads' cost of commuter service was in fact common with the cost of freight service and how much was solely related to commuter service" (B. & O. J.S. App. 21a),[23] and concluded that the Commission failed to make adequate findings in this regard. However, a meaningful comparison of the relationship of fully distributed costs can only be made on the basis of including all passenger deficits. These deficits represent money lost to the respective railroads by reason of the fact that the Interstate Commerce Act requires the continued rendition of necessary passenger services. Such losses must be recovered from profitable freight traffic if the railroads are to remain solvent and continue to operate in conformity with the congressional objectives enunciated in the National Transportation Policy (49 U.S.C. preceding Section 1). Here the district court's decision would unduly restrict the Commission's ability to carry out the will of Congress

[23] At several places in its opinion, the district court referred to the fact that the Commission itself had noted that some costs of providing suburban service could be considered as solely related to that kind of service (B. & O. J.S. App. 20a–21a, 31a). In light of what it regarded as "a concession that many commuter facilities are solely related to that service and have nothing whatsoever to do with the cost of handling the North-South traffic or any other freight traffic" (*id.* at 21), the court found the Commission's treatment of suburban passenger deficits inconsistent and unsupportable. That some costs of providing suburban service might be considered as solely related, however, hardly leads to the conclusion that all such costs can or should be so regarded or that the Commission acted improperly in not excluding some of these costs here. Many costs of inter-city passenger service are also solely related thereto, e.g. stations, cars, train operation etc., and the Commission included these.

by prohibiting the dividing of joint rates in conformity with the factors which went into their composition. In this respect as well, therefore, the decision below would seriously interfere with the Commission's effective administration of Section 15(6).[24]

CONCLUSION

The district court has erected a rigid formula for ascertaining relative costs of service which will impair

[24] Several paragraphs of the district court's opinion discuss in quixotic fashion the question of "inherent territorial disadvantages" (B. & O. J.S. App. 16a–19a). As the court pointed out, it was strenuously urged that "as a matter of law the Northern railroads cannot have an increase [in divisions] in the absence of inherent territorial disadvantages" (*id.* at 19a). Stating that it could not determine whether the Commission had resolved this issue, the district court concluded that, if it had, its determination suffered from a lack of findings and substantial evidence, and that, if it had not, it had failed to resolve a material issue. Thus, the court stated that the case was being decided on other grounds but that the Commission "should decide and dispose of this contention in accordance with the Administrative Procedure Act" upon remand (*ibid.*). As the Commission pointed out, "In essence, however, other factors being equal, cost differences generally are the product of, and reflect, the inherent advantages and disadvantages that go to make up the respective overall transportation conditions in the two territories" (325 I.C.C. at 28). Continuing, the Commission further stated, "Indeed, the continued maintenance of divisions which, all other things being equal, do not reflect the relative costs of service would not suggest justice between the parties" (*ibid.*). Thus, the Commission simply determined that, in a divisions case where the carriers were found to be efficient and the fairness of existing divisions and the need for revised divisions was assessed on the basis of relative costs of service, it was appropriate to conclude that cost differences reflect inherent territorial disadvantages, insofar as that consideration is relevant under Section 15(6).

the Commission's Section 15(6) power to prescribe fair divisions. In substituting its own view as to what constitutes the proper yardstick for measuring relative costs, the district court departed from prior decisions of this Court and past Commission practice, and misconceived not only the requirements of Section 15(6) but also its own function as a reviewing tribunal. See *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535–536. This appeal thus presents a substantial question in the administration of the Interstate Commerce Act and probable jurisdiction should be noted.

Respectfully submitted.

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DECEMBER 1967.

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MOTION TO AFFIRM

NOS. [redacted] AND [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al., Appellants,*

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al., Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al., Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

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No. 925

INTERSTATE COMMERCE COMMISSION, *Appellant*,
v.
ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*, *Appellees*.
No. 938

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Appellee Southern railroads, listed in Appendix A hereto, move pursuant to Rule 16 of the Revised Rules of this Court that the judgment of the district court be affirmed on the ground that the judgment below is so clearly correct that plenary review by this Court is not warranted.

QUESTION PRESENTED

The Interstate Commerce Commission entered an order which abandoned the previously-established equal treatment of the North and the South in dividing the revenues from

freight traffic moving between those territories and substituted a new basis of divisions substantially inflating the Northern share of the joint revenues and correspondingly reducing the share of the Southern railroads. The question presented to this Court is whether the district court properly set aside this order and remanded the cause to the Commission on the ground that the order violated Sections 8(b) and 10(e) of the Administrative Procedure Act in that it was supported neither by reasoned findings nor substantial evidence in the record.

STATEMENT

Prior to the Commission's decision in this case, divisions of joint rates on North-South traffic were made by use of an equal-factor scale so that railroads in Northern and Southern territories received equal compensation for the same amount of service performed.[1] This equal basis of divisions had been in effect since 1953 when the Commission prescribed uniform divisional scales for use in dividing revenues on North-South freight traffic. *Official-Southern Divisions,* 287 I.C.C. 497, 523, 546-547 (1953). The establishment of equal divisions came shortly after the Commission's historic decision in *Class Rates Investigation, 1939,* 262 I.C.C. 447 (1945), affirmed by this Court in *New York* v. *United States,* 331 U.S. 284 (1947), which determined that the higher rate levels at that time applicable to the movement of rail freight throughout Southern territory constituted an unlawful discrimination against the South, and replaced the discriminatory structure with a uniform rate structure applicable throughout the United States east of the Rocky Mountains.

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[1] Thus, on a shipment travelling 300 miles in both Northern and Southern territories, the Northern and Southern railroads each received 50% of the joint rate (287 I.C.C. at 547, 552).

The Northern railroads thereafter petitioned the Commission for an inflation in the divisional scale for the North. Their claim for preferential treatment was based exclusively upon allegedly higher costs, as shown by the "Rail Form A" cost formula. The Southern railroads pointed out that the relevant costs were not territorial average costs, which are the product of the Rail Form A formula, but rather the costs incurred in handling North-South traffic—the traffic which produced the joint rates being divided.[2] They presented evidence showing that territorial averages do not measure the costs of performing the various services which go into the transportation of North-South freight traffic. They showed that for most items, such as running trains, maintaining roadway, and the like, Northern and Southern average costs were equal, and that a relatively few factors, such as higher territorial "interchange" costs, car costs, "switching" costs, "empty return ratios," and suburban commuter deficits, were responsible for producing the claimed higher costs in the North. The issue thus presented was whether these relatively few "inflating" territorial average factors were, in fact, related to North-South traffic, or whether on the other hand, the unadjusted territorial averages misstated the costs of North-South traffic.

The Commission held that Section 15(6) criteria such as "revenue need" and "public importance" were substantially

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[2] The relevant traffic, i.e., the North-South traffic which produces the revenues to be divided, yields only 6.0% of the total freight revenue of the Northern railroads, and only 21.4% of the freight revenues of the Southern railroads (Verified Statement No. 36, Ex. 5). Where, as here, the relevant traffic comprises only about 6% of the total traffic, it is necessary to distinguish between (1) territorial average costs developed for *all* traffic, and (2) the costs of North-South traffic, which the Commission found to be the controlling test in this case.

equal, and that divisions of joint rates should reflect the relative costs of handling North-South traffic (325 I.C.C. at 26, 50, 56). However, the Commission actually used unadjusted territorial averages to compute the costs of the controverted services involved in transporting North-South freight. On the basis of these averages, which were higher in the North than in the South, the Commission abandoned the divisional equality between the two territories and prescribed new divisions substantially inflating the share of the Northern railroads at the expense of the Southern railroads. For example, under the newly-prescribed divisions, for a shipment moving 300 miles in both Northern and Southern territories, the Northern divisional factor was 241, whereas the Southern factor was 206 (325 I.C.C. at 82). This constitutes a 17 per cent inflation in favor of the Northern railroads—an inflation which becomes much greater (up to 45 per cent) at the shorter hauls and somewhat less at the longer hauls (*ibid.*).

The Southern railroads filed this action in the District Court for the Eastern District of Louisiana to set aside that part of the Commission's order prescribing the inflation in the divisions of the Northen railroads. The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners filed an intervening complaint.

The three-judge district court (Circuit Judge Wisdom and District Judges West and Hunter) set aside the Commissioner's order and remanded the cause to the Commission for further proceedings on the ground that the Commission erred "in prescribing divisions on the basis of the average cost of all traffic for this series of important elements of cost which are higher in the North for reasons that have not been shown to have any relation to the North-South freight traffic here at issue" (B&O J.S. App. A, p. 24a). The district court held that in a case such as this,

where "the outcome of factual issues is bound to cut deeply into economic relations on such a scale and when the result involves a departure from an equal division formula previously adopted," the Commission must satisfy the requirements of the Administrative Procedure Act that there be substantial evidence supporting findings with respect to the several critically important cost elements that accounted for the entire inflation awarded to the North (B&O J.S. App. A, p. 31a). The Northern railroads (B&O et al.) and the Interstate Commerce Commission appealed from the district court's judgment.[3] The United States, the statutory defendant, did not join in the appeals.

NO SUBSTANTIAL QUESTION IS PRESENTED BECAUSE THE DISTRICT COURT'S ACTION IN SETTING ASIDE THE COMMISSION'S ORDER FOR VIOLATIONS OF SECTIONS 8(b) AND 10(e) OF THE ADMINISTRATIVE PROCEDURE ACT WAS CLEARLY CORRECT.

I. The fundamental question presented to the district court was whether the Commission's use of the costs of one category of traffic (unadjusted territorial average costs) to measure the costs of a different category (the costs of

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[3] 28 U.S.C.A. § 2101, provides that the time within which to appeal an adverse judgment to the Supreme Court begins with the entry of that judgment. Commission counsel contend that the judgment of the district court was entered on August 22, 1967 (ICC J.S. p. 2) so that the Commission's notice of appeal was timely filed within the sixty-day time limit. However, the date of entry was August 8, 1967—the date appearing on the face of the decree (B&O J.S. App. B, p. 34a). The district court stated in its "Order Staying Decree," which was also dated August 8, 1967, that the Decree itself was "signed, dated, *and entered* concurrently herein on this date" *(id.* pp. 35a-36a) (emphasis added).

North-South traffic at issue) had any foundation in findings supported by substantial evidence. The absence of any such foundation was the basis on which the district court set aside the Commission's orders.

Yet counsel for the Commission and the Northern railroads would make it appear that the district court's decision contained principles much more far-reaching and ominous. They say that the district court imposed "novel standards" on the Commission (ICC J.S. p. 5), and that it invaded the Commission's authority in holding that the Commission "was obligated as a matter of law to develop more refined cost data described by the District Court as the 'actual costs of handling the specific traffic at issue'" (B&O J.S. p. 4). They also interpret the district court's decision as a "rejection by the district court of Rail Form A cost figures . . ." and as a holding that the Commission "cannot accept, as a standard of measurement, computations produced through use of Rail Form A territorial average costs as appropriately adjusted" (ICC J.S. p. 11). Finally, they contend that the district court overstepped the bounds of appropriate judicial review and left "little if anything . . . to informed expertise and practical judgment of the administrative body" (ICC J.S. p. 16; see also B&O J.S. pp. 21-22).

The "horribles" paraded in the Jurisdictional Statements of appellants are entirely imaginary, for they have no basis in the decision of the district court. The district court imposed no "novel standards" on the Commission. It was the Commission itself, not the district court, which held that the controlling factor in the determination of equitable divisions on North-South traffic should be the relative costs of the Northern and Southern railroads with respect to that particular traffic—not their relative costs on all

traffic in both territories (325 I.C.C. at 26, 50, 56).[4] The court below held, as it was obliged to do as a matter of law (p. 18, *infra*), that the Commission having selected the standard upon which the case was to be decided, the adequacy of the Commission's findings and evidence must be tested in the light of that standard (B&O J.S. App. A, p. 25a).

Nothing in the decision of the district court precludes the Commission from relying on Rail Form A costs "as appropriately adjusted" (see ICC J.S. p. 11). Nor does anything in that decision justify the Commission's concern that the integrity of Rail Form A is under attack, or its fear that other cost formulas have been tainted by the suspicion of invalidity (*ibid.*).[5] The district court recognized explicity that:

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[4] The Commission repeatedly and unequivocally stated its standard as "the relative costs of the parties reflecting their respective operations as to this traffic" (325 I.C.C. at 50), "the costs which are attributable to the traffic at issue" (326 I.C.C. at 26), and "the purpose is to measure the cost of services performed under the line-haul rates to be divided" (325 I.C.C. at 56). Yet the Northern railroads persistently and erroneously attribute the establishment of this standard to the district court (e.g., B&O J.S. pp. 16, 21, 9).

[5] Thus, the elaborate justification of Rail Form A offered by the Northern railroads (B&O J.S. pp. 13-16) only justifies that which is not in dispute. In the *Class Rate Investigation*, relied upon by the Northern railroads, "the intent of the cost study was to reflect territorial average operating conditions . . ." (262 I.C.C. at 588). This Court's decision in *New York* v. *United States*, 331 U.S. 284, 309 (1947) upheld the Commission's class rate action as intended to affect the rate levels on all traffic. As a result, that case can be cited as authority for the use of Rail Form A territorial averages to measure territorial average costs, a proposition we have nowhere disputed; but it is no authority for using Rail Form A, without adjustment or supporting evidence, to measure a 6% segment of those total costs.

> ". . . the Rail Form A cost formula was devised for the express purpose of measuring territorial average costs and has been widely used as an acceptable means of comparing relative transportation costs. It represents a comprehensive study entitled to full weight when the issue is one that it was designed to cover." (B&O J.S. p. 24a.)

However, when the Commission has adopted as its standard the costs of handling North-South traffic, unadjusted territorial averages are not enough, by themselves. Appellants are seeking to use unadjusted territorial averages, which are admittedly higher in the North than in the South, to measure the controverted and important elements of the costs of North-South traffic, without *any* evidence that the costs of the former measure the costs of the latter. However, as the district court stated:

> "[Territorial average costs] cannot appropriately be accepted *without further evidence for mechanical application to particular segments of traffic* in a divisions case. The 'many minute calculations' contained in Rail Form A were used to measure the overall average costs and certainly produce a misleading appearance of exactitude when applied mechanically to measure a specific cost of a specific body of traffic such as that involved here. Evidence of overall territorial averages surely can and should be considered, but as to specific important cost items the Commission should *not wholly and exclusively* rely on such averages. *United States* v. *Abilene and Southern R.R. Co.*, 265 U.S. 274; *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 225 F. Supp. 584.[6] The Commission stated its exclusive standard to be the relevant cost of handling the specific

[6] In that case, the District Court for the District of Colorado (per Judge Doyle) set aside orders of the Commission in a divisions case between the North and part of the Midwest for failure to comply with the requirements of the Administrative Procedure Act (225 F. Supp. at 606-607). Neither the Commission nor the United States appealed.

> freight traffic to which the divisions apply. We are persuaded that the order is not based on substantial evidence nor supported by reasoned findings within the meaning of Sections 8(b) and 10(e) of the Administrative Procedure Act because the use of territorial averages accounting for the Northern inflation has not been supported with findings of evidence relating any such inflation to the North-South freight traffic." (B&O J.S. pp. 24a-25a; emphasis added)

In referring to "specific important cost items" as to which the Commission relied upon Rail Form A without adjustment, the district court was well aware that the entire inflation in the Northern territorial averages stems from a few services as to which the averages are higher in the North than the South (B&O J.S. App. A, p. 11a). Freight transportation service is a combination of numerous different elements.[7] As to most services involved in hauling freight, such as operating trains and maintaining tracks and stations, the costs of the Northern and Southern railroads are the same. The overall Northern territorial average cost inflation is attributable to a few higher Northern service costs, such as car costs, the cost of commuter operations, the ratio of empty-to-loaded cars, the costs of interchanging and switching the cars (Verified Statement No. 39, pp. 62-63). Indeed, even now Commission counsel do not challenge the holding below that these several cost items are responsible for the entire Northern inflation.[8]

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[7] Rail Form A territorial costs are, as Commission counsel concede, broken down into the costs "of performing each of the kinds of service involved in that transportation" (ICC J.S. p. 3).

[8] The Northern railroads refer to Northern wage levels, which they say are higher than those in the South (B&O J.S. p. 22 n. 12). The cost of labor was not one of the elements of Rail Form A costs relied upon by the Commission to show a generally higher Northern cost level. Nor could the Commission have relied upon labor costs, because higher wages in the North, which are only 2 per cent higher

Because the Commission granted an inflation to the North under the standard of costs related to North-South traffic, and because the higher Northern territorial averages actually used by the Commission are higher only because of a few elements of costs, it is especially incumbent upon Commission counsel to state the reasons and point to the evidence in the record which justifies the use of unadjusted territorial average costs with respect to these critical services.[9] No such evidence is identified; there are only the averages themselves.

Since North-South traffic constitutes only 6% of all Northern traffic, it is arbitrary to assume without evidence that the average costs of 100% of Northern traffic would measure the costs of 6% of that traffic, as it would be arbitrary to assume that every 6% segment of the traffic would fairly represent the entire traffic. To say that samples must be based on evidence showing that they are

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than in the South and which occur in the "executive and professional" categories (Tr. R. 2629-31; Verified Statement No. 80, Ex. F-1, F-2), are offset by the far greater traffic density on the lines of the Northern railroads than is enjoyed on the lines of the railroads operating in the South (Verified Statement No. 36, Ex. 1, p. 21). Whatever the factors affecting the levels of these costs in the several territories their net effect is that the costs *per unit* of traffic are not higher in the North except for the several critical elements referred to in the text.

[9] Commission counsel have a curious way of putting the question. They say several times that the question is whether the Commission may rely on territorial averages "as appropriately adjusted" (ICC J.S. p. 11; see also pp. 3, 13, 17). The difficulty is that, with respect to costs of performing the particular services in North-South traffic which account for the Northern territorial inflation, the Commission did *not* rely on averages which were adjusted in *any* way, much less "appropriately adjusted." The Commission relied instead on unadjusted averages—with no evidence that these averages measured the cost of North-South traffic which the Commission found to be the decisive standard.

representative is not to say that samples may not be used.[10] By the same token, to require that averages must be supported by evidence indicating that they are fairly representative of the costs on a narrow segment of traffic is a far cry from holding that averages may not be used. Yet that is all that the district court required here: "[T]his formula was designed to measure the cost of handling all the traffic in two or more territories, and cannot appropriately be accepted *without further evidence* for mechanical application to particular segments of traffic in a divisions case" (B&O J.S. App. A, p. 24a) (emphasis supplied).

Where is the evidence to support the use of unadjusted average Rail Form A costs to measure the critical cost factors? There is no such evidence.[11] There is only the unsup-

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[10] The Commission itself has subsequently held, in *Increased Rates within Southwest, and Between Colo. & Wyoming and Southwest*, 326 I.C.C. 216, 236-237 (1966), that "if selected carriers are used as a basis for a showing of revenue needs for all respondents, competent testimony must be produced to establish that they are typical of the group as a whole. . . . Facts, and not unsupported conclusions or opinions of interested witnesses, are required for such a finding."

[11] The Northern railroads now refer to evidence which they say shows "that territorial costs properly show the cost of performing the service on the North-South traffic (V.S. 8)" (B&O J.S. pp. 14-15). The Verified Statement referred to is a "train utilization study" which was not even cited by the Commission and which had nothing to do with the service costs responsible for the Northern inflation; it dealt with the costs of operating trains—costs which do not account for the inflation granted to the North. With respect to the cost elements that do account for that inflation, the witness who introduced the "train utilization study" conceded that he knew nothing about empty return ratios (Tr. R. 499); and a study of freight trains obviously had no bearing on the costs of commuter service or the other elements accounting for the inflation.

By relying on the "train utilization study," appellants in effect admit that unadjusted averages, by themselves, are insufficient to

ported conclusion that territorial average costs are appropriate to the traffic in this case because "it is a large and varied body of traffic" (ICC J.S. p. 13; B&O J.S. p. 23). However, this statement was made in connection with a single proposed adjustment, having to do with switching costs (325 IC.C. at 76). It does not alter the uncontroverted fact that North-South traffic constitutes only 6% of the total Northern traffic. Furthermore, the varied nature of this traffic has nothing to do with the fact that by relying on territorial average costs the Commission included deficits arising out of Northern commuter operations unrelated in *any* way to North-South traffic. Nor does it lend any support to the Commission's use of territorial average empty return ratios 10% higher in the North than the South even though the Northern average is inflated by the unusually high empty return ratios of special box cars which are used to a much greater extent in the North than in connection with the North-South traffic—such as the specially-designed auto parts cars in service in the Detroit area (325 I.C.C. at 64, 54). Similarly, it is completely unrelated to the Commission's use of 58% higher Northern costs of interchanging cars at the territorial gateway (325 I.C.C. at 37, 456)—an inflation unjustifiable where the costs are incurred by the Northern and Southern railroads in handling the *same* cars at the *same* points.

The Northern railroads cite *Chicago & N.W.R. Co.* v. *A.T. & S.F. R. Co.*, 387 U.S. 326 (1967), as authority for the proposition that the cost studies used in divisions cases

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show the costs of North-South traffic. Yet appellants are unable to point to any evidence which even purports to relate to North-South freight traffic the average costs for those elements which account for the entire inflation given to the Northern railroads. This Court has held that use by the Commission of general formulas and unsifted averages cannot take the place of findings and evidence. *I.C.C.* v. *Mechling*, 330 U.S. 567, 581-583 (1947).

can be "predicated upon Form A territorial averages" (B&O J.S. p. 19), and Commission counsel argue to the same effect (ICC J.S. p. 15). But no party here contends that Rail Form A cannot provide the framework for analysis. The critical point here is that neither the Northern railroads nor the Commission counsel can cite this Court's decision in that case to support the abandonment of territorial equality in divisions without substantial supporting evidence. In *Chicago & N.W. R. Co.*, the Commission's order reduced a divisional inflation favoring the Mountain-Pacific lines (387 U.S. at 331-332, 336-337), whereas in this case the Commission's order *created* the Northern inflation which is now under attack; also, the alignment of the parties is reversed since in this case it is the victims—not the beneficiaries of the inflation—who attack the order. The district court in this case gave full consideration to, and carefully distinguished the *Chicago & N.W. R. Co.* case (B&O J.S. App. A, pp. 25a-26a).

Finally, it is argued that matters of cost are questions of fact "within the special competence and discretion of the Commission" (ICC J.S. p. 12), and that the district court's decision reduces the Commission's function to "ministerial tasks" of performing calculations (ICC J.S. p. 14; see also B&O J.S. pp. 21-22). The Commission fears that "little if anything is left to informed expertise and practical judgment" (ICC J.S. p. 16). But the decision below in no way invades the Commission's special province. The court below explicitly recognized the special responsibility of the Commission:

> "We start, of course, from the premise that on the subject of transport economics, the Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for experts and, unlike a problem in mathematics, it cannot be precisely right or wrong." (B&O J.S. App. A, p. 24a)

The district court understood that: "As to the sufficiency of the evidence to support the order, it is *not* the proper function of this Court to substitute its judgment or to weigh evidence" (*ibid.* p. 26a) (emphasis supplied). Its decision thus represents no more than an application of the requirements set forth in the Administrative Procedure Act, and enforced by this Court in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962):

> "[The Commission] must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Comm'n* v. *J-T Transport Co.*, 368 U.S. 81, 93; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488-489; *United States* v. *Chicago, M., St. P.R. Co.*, 294 U.S. 499, 511."

What counsel for the Commission are now asking is an end to any effective judicial review of its decisions in matters where costs are of central significance. Appellants are contending, essentially, that the requirements of the Administrative Procedure Act do not operate with respect to the Commission in prescribing divisions. But they are unable to cite any case which would relieve the Commission of its obligations under the Act to support its action with findings based upon substantial evidence.[12]

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[12] The Northern railroads rely heavily on the pre-Administrative Procedure Act decision in *Illinois Commerce Commission* v. *United States*, 292 U.S. 474 (1934) (B&O J.S. pp. 21-22, 25), even though that case had nothing whatsoever to do with the requirement of adequate findings or substantial evidence. It involved a Commission order directing "the removal of unjust discrimination against interstate commerce, resulting from disparity of the intrastate and interstate switching rates of interstate rate carriers in the Chicago Switching District" (292 U.S. at 476), based on a specific cost study of switching movements in Chicago. That case would be analogous to the present case only if the cost study actually relied upon to measure Chicago switching costs had been developed from the costs of all switching movements throughout the entire State of Illinois, or perhaps the entire Official Territory.

The district court below inquired whether there was any rational basis or any evidence to support the use of unadjusted territorial averages in place of the costs of several particular services involved in North-South traffic. It could find none. Although it was the district court's task to decide in the first instance if the requirements of the Administrative Procedure Act had been met, and despite the holding below that there was no substantial evidence to support the Commission's use of unadjusted territorial averages to measure the particular cost factors which account for the entire inflation given the North, appellants do not even suggest that this Court should actually review the evidence in the record to determine if the lower court was in error. They ask that this Court reverse the decision below, but they do not refer to any part of the record where such evidence can be found. Indeed, Commission counsel now attempt to defend its orders with the theory that the district court should not have inquired into the basis for the Commission's reliance on Rail Form A averages. This kind of defense is wholly incompatible with the obligations imposed on both the Commission and reviewing courts by the Administrative Procedure Act. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167-168 (1962); *Mississippi River Fuel Corp.* v. *F.P.C.,* 163 F.2d 433, 439 (D.C. Cir. 1947); *Government of Guam* v. *Federal Maritime Commission,* 365 F.2d 515 (D.C. Cir. 1966).

II. As to the seven cost elements of North-South freight transportation which account for the entire Northern cost inflation, the Commission used unadjusted Rail Form A territorial average costs to measure the costs of North-South traffic. The district court found that inclusion of one such cost—suburban passenger deficits—as part of the cost of North-South traffic through reliance on territorial averages was "typical of the overall approach of the Commission" (B&O J.S. App. A, p. 20a).

The territorial average costs used by the Commission include deficits attributable to both intercity passenger service and suburban commuter service. The Commission held that deficits attributable to passenger service should be assessed as a part of the cost of freight service where there are common costs, and no party disputes this finding. Common costs include the costs of maintaining track and bridges and the like where passenger and freight trains use the same facilities. Consequently, if passenger service is unable to bear its full share of the burden of facilities which must be maintained to handle freight trains, the burden may properly be assigned to freight service.

The same cannot be said of many commuter facilities. The operation of suburban commuter trains requires equipment and facilities which have no relation at all to freight service. Many of the tracks are different, as are the terminals and yards. The Commission recognized this when it expressly found that "many individual items of suburban service can be considered solely related . . . to suburban service" (325 I.C.C. at 78). The Commission itself thus found that many of the costs incurred in providing suburban commuter service were completely unrelated to any freight traffic, much less North-South freight traffic. Yet, through the use of Rail Form A unadjusted averages, the deficits arising out of all Northern commuter operations—including those completely unrelated to freight traffic—were included in the Northern average costs which the Commission applied to North-South traffic.

The district court recognized the inconsistency in the Commission's finding that many aspects of commuter operations are totally unrelated to North-South freight traffic, and its simultaneous inclusion of deficits arising from those unrelated commuter operations as a part of the costs of North-South freight traffic. There is no rational support

for the inclusion of such deficits as a part of the relevant costs which, by the Commission's own test, are the costs of the North-South freight traffic. Thus, under the Commission's own findings the pertinent question was what part of the North's total suburban operation was related, by virtue of common facilities, to North-South freight traffic. The Commission's finding, quoted by appellants (ICC J.S. p. 21) justifies attributing a portion of *common* costs to freight traffic costs. But that finding provides no justification whatever for attributing to North-South freight traffic any costs that are solely related to commuter service and thus have no relation to North-South freight traffic. As the court below held (B&O J.S. App. A, p. 21a):

> "The critical issue on this cost item was to determine how much of the railroad's cost of commuter service was in fact common with the cost of freight service and how much was solely related to commuter service. But, in accordance with its general approach to these issues the Commission, by adopting Rail Form A, inflated the Northern railroads' freight costs by the entire commuter deficit of those railroads, without regard to the plain conflict between this action and its own finding that 'many individual items of suburban service can be considered solely related . . . to suburban service.'"

The district court thus held that the Commission's result was arbitrary and unsupported by evidence, and set aside the order, which would have placed the burden of Northern commuter deficits, unrelated to North-South freight traffic, on the Southern economy, its railroads and its people, through an inflation in the Northern divisions.

The present attempts of counsel for the Commission and the Northern railroads to bridge the gap between the costs of North-South freight traffic held by the Commission to be controlling and the costs actually used violate the

rule in *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947).[13] Commission counsel now argue that because commuter deficits may be taken into account in determining rates, they should also be taken into account in making divisions of those rates (ICC J.S. p. 21). This theory was not advanced by the railroads in the proceedings before the Commission and did not constitute any part of the basis upon which the Commission decided the case. On the contrary, the Northern railroads took the position that "a change in divisions is not dependent on a change in rate levels," and admitted that the North sought "*disproportionate* divisions of a uniform structure of rates."[14]

As the Northern railroads recognized before the Commission, rate levels are no higher in the North than in the South. Rate levels have been the same since the Commission proceedings in which equal class rates were upheld by this Court in *New York* v. *United States*, 331 U.S. 284 (1947). The Northern railroads, having lost their preference in the form of lower rates, now seek to regain that preference in the form of inflated divisions.

This Court has recently recognized the difference between the issues involved in rate cases and those in divi-

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[13] "(A) simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper the court is powerless to affirm the administrative action." (332 U.S. at 196). See also *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962); and *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965).

[14] Reply of Eastern Railroads to the Exceptions of Southern Governors' Conference, et al., dated November 30, 1963, p. 18 (emphasis in original).

sions cases.[15] As a result, the cases cited by appellants (ICC J.S. p. 21; B&O J.S. p. 28), such as *King* v. *United States*, 344 U.S. 254 (1952), with respect to the determination of rate levels only emphasize the violation of the rule in *Chenery, supra*.[16]

Finally, Commission counsel argue that since deficits represent "money lost," and since such losses must be recovered "if the railroads are to remain solvent," the Commission must consider these deficits in determining divisions (ICC J.S. p. 23). This argument rests on a theory of the general revenue needs of the Northern railroads,[17] and

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[15] This Court's decision in *Chicago & N.W.R. Co.*, relied upon below (B&O J.S. App. A, p. 22a), fully supports the decision of the district court (387 U.S. at 350):

> "[W]hile the Commission has sometimes acted to offset passenger deficits in freight rate cases, the issues are quite different when, in a divisions case it is argued that carriers in one part of the country should subsidize the passenger operations of carriers elsewhere."

[16] *King* v. *United States*, 344 U.S. 254, (1952), involved the prescription of rates—not divisions. And this Court recognized that the *King* case had nothing to do with facilities "solely related" to passenger service: "In Florida, however, the discontinuance of railroad passenger service would not permit the discontinuance of high-speed tracks and equipment because of the need for fast freight schedules to transport perishable fruits and vegetables from Florida" (344 U.S. at 265).

[17] The Jurisdictional Statement of the Northern railroads also makes it clear that they are concerned with "revenue needs" rather than the "costs of North-South traffic"; they refer again to their argument, which the district court rejected, that the costs of commuter deficits should be "treated as overhead, or constant costs, the allocation of which is required *because of the need for revenue* from the freight service to continue operations" (B&O J.S. p. 27) (emphasis supplied).

King v. *United States*, 344 U.S. 254 (1952), cited by the Northern railroads (B&O J.S. p. 28), had to do with whether higher freight rates were justified by revenue needs (344 U.S. at 267-268); it had nothing to do with the costs of any category of traffic.

in effect admits that the deficits arising from commuter services are unrelated to the relative costs of North-South traffic. The revenue needs question was considered by the Commission, which determined that there was no difference in the revenue needs of the railroads of the two territories (325 I.C.C. at 49):

> "Accordingly, we see no justification at this time for adding any special increment favoring one group of carriers over the other. We find that no affirmative reasons appear in this record which would warrant any adjustment of the divisions in question over and above the relative costs of service, either on the grounds of *greater revenue need* or otherwise." (emphasis added)[18]

It was argued before the district court, as it is now argued here, that the Commission charged the entire Northern suburban commuter deficit to freight traffic "as a matter of policy, and that is that there is a need for that revenue to continue operations." (B&O J.S. App. A, p. 21a) The district court rejected the argument as follows (B&O J.S. App. A, p. 21a):

> "The complete answer to this contention is that the Commission did no such thing. The revenue need issue was hotly contested before the Commission, each group contending that its needs were greater—the Northern railroads, on the basis of lower rates of return; the Southern railroads, on the basis of their growing service responsibilities to an expanding economy. The Commission rejected both contentions. . . ."

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[18] Having admitted that they are relying on "revenue needs," the Northern railroads argue that the district court ignored the Commission's finding permitting the allocation of "overhead" to relative costs. (B&O J.S. p. 27). But the passage they cite (325 I.C.C. at 49) refers only to overhead costs which are related to the costs of North-South freight traffic. The next two sentences of the Commission's report expressly reject the revenue needs argument.

Thus, the resurrection of the revenue needs question at this time is a clear violation of the *Chenery* rule, and amounts to a concession that the Commission's treatment of commuter deficits cannot be defended on the basis adopted by the Commission itself.

The district court cited switching costs and empty-return ratios as two other illustrations of the Commission's error in relying, without evidence, on unadjusted territorial average costs (B&O J.S. App. A, pp. 22a-23a). The district court held that the Commission's reliance on these averages was not supported by findings based upon substantial evidence in the record (B&O J.S. App. A, pp. 22a-24a, 31a). Commission counsel would brush these objections aside, not by pointing to evidence in the record to show that the averages do in fact measure the costs of North-South traffic, but by criticizing the Southern studies for a "variety of weaknesses" (ICC J.S. p. 20). But the court below was not passing on the strength or weakness of the Southern railroads' cost adjustments; it simply held that there was no evidence to support the use of higher costs in the North with respect to these cost elements (B&O J.S. App. A, pp. 30a-31a).[19]

Commission counsel object to the district court's references to the Commission's powers to obtain cost evidence, arguing that there was no need for the Commission to act because the unadjusted territorial averages, in their view, adequately measured the costs of handling North-South traffic (ICC J.S. p. 17). However, Commission counsel

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[19] The district court found that (B&O J.S. App. A, pp. 19a-20a): "The Commission did not assume any responsibility for the development of a more adequate record, and in several instances held that the absence of comparable evidence in the record itself [i.e. evidence as to Northern costs comparable to that presented by the Southern railroads as to their own costs] prevented adjustments in territorial averages."

can hardly object to the holding below that the Commission has ample power to obtain relevant evidence.

The point of the district court's conclusion is that the Commission's finding of higher costs in the North was not supported by evidence (B&O J.S. App. A, p. 29a). The burden was on the North to produce such evidence; but even where the North did not present adequate data, the Commission had ample power to require its production. The court below simply held that, the necessary evidence not having been obtained by any means, the inflation in Northern divisions was unsupported and unjustified.[20]

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[20] The Northern railroads also suggest that the district court erred in failing to reserve jurisdiction to enter further orders thought to be "proper" (B&O J.S. p. 32). However, they never asked the court below to reserve jurisdiction. Moreover, they agreed in the court below to re-settle all revenues accruing during this litigation in accordance with the pre-existing basis of divisions, in the event the Commission's orders were set aside. Such a refund simply reflects the inflation to which they have not shown they are entitled.

As to the loss of the inflation in future years, the Northern railroads say the Commission should have reserved jurisdiction because "the Court below found nothing to warrant any inference, that development of the more refined costs it deemed essential would at all warrant lower divisions for Northern lines than those prescribed in the orders under review. . . ." (B&O J.S. p. 32). On the one hand they attack the court below for second-guessing the Commission—which it did not do; on the other hand they suggest that the district court made a mistake in not speculating about what divisions *might* be warranted upon remand.

Furthermore, even after complying with their agreement to repay the difference between the prescribed divisions and the pre-existing divisions, the Northern railroads will still be the beneficiaries of a terminal factor in the pre-existing divisional scale which the Commission found to be excessive in the amount of $7,426,000 annually—an amount which, in the almost three years since the Commission's decision, has amounted to over $22 million (325

CONCLUSION

The district court has properly applied the standards of the Administrative Procedure Act to the Commission's orders at issue in this case. It has emphasized—not undermined—the Commission's responsibilities. The district court, in remanding the cause to the Commission, has not restricted the Commission in its use of Rail Form A costs or any other factor so long as their application under the standard adopted by the Commission is supported by evidence.[21] No new limits or standards have been imposed on the Commission's discretion. There is only the requirement that its orders be based upon findings which are supported by evidence.

This case has been remanded to the Commission for further proceedings consistent with the requirements of the Administrative Procedure Act. The United States, which is charged by statute with the responsibility for defending orders of the Commission, has not appealed this disposition of the case.

I.C.C. at 37, B&O J.S. App. A, p. 5a). The district court concluded that the Commission's order was not severable, and set aside the correction of the excessive terminal factor at the same time it set aside the Northern inflation (B&O J.S. App. A, p. 6a).

[21] Contrary to the interpretation of the Northern railroads the district court did not hold that the Commission must "start all over again" (B&O J.S. p. 31). On the contrary, while observing that evidence was becoming more and more vulnerable to the charge of staleness, the court specifically stated that its observation did *not* "indicate that it would necessarily be an abuse of discretion for the Commission not to re-open the investigation to receive later operating figures. . . ." (B&O J.S. App. A, p. 23a).

Accordingly, the judgment of the district court should be affirmed without further argument.

Respectfully submitted,

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Of Counsel.

January, 1968

APPENDIX A

Aberdeen and Rockfish Railroad Company;

The Alabama Great Southern Railroad Company;

Apalachicola Northern Railroad Company;

Atlanta and West Point Railroad Company;

Birmingham Southern Railroad Company;

Cape Fear Railways, Incorporated;

Carolina and Northwestern Railway Company;

Central of Georgia Railway Company;

Chattahoochee Valley Railway Company;

The Cincinnati, New Orleans and Texas Pacific Railway Company;

Clinchfield Railroad Company;

Columbus and Greenville Railway Company;

Durham and Southern Railway Company;

Florida East Coast Railway Company;

Frankfort and Cincinnati Railroad Company;

Georgia & Florida Railway Company;

Georgia, Ashburn, Sylvester and Camilla Railway Company;

Georgia Northern Railway Company;

Georgia Railway and Banking Company;

Georgia Southern and Florida Railway Company;

Gulf, Mobile & Ohio Railroad Company;

Illinois Central Railroad Company;

Interstate Railroad Company;
Laurinburg and Southern Railroad Company;
Louisiana and Arkansas Railway Company;
Louisiana Southern Railway Company;
Louisiana and Nashville Railroad Company;
Meridian and Bigbee Railroad Company;
New Orleans and Northeastern Railroad Company;
New Orleans Terminal Company;
Norfolk Southern Railway Company;
Piedmont and Northern Railway Company;
St. Louis-San Francisco Railway Company;
Savannah & Atlanta Railway Company;
Seaboard Coast Line Railroad Company;
Southern Railway Company;
Tennessee, Alabama and Georgia Railway Company;
Tennessee Central Railway Company;
Valdosta Southern Railroad;
Western Railway of Alabama.